

United States Senate

WASHINGTON, DC 20510

September 10, 2014

COMMITTEES:
ENERGY AND NATURAL RESOURCES
COMMERCE, SCIENCE, AND
TRANSPORTATION
BANKING, HOUSING, AND
URBAN AFFAIRS
SPECIAL COMMITTEE ON AGING
VETERANS' AFFAIRS

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

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Dear Chairman Wheeler;

I write to you today in response to recent press reports that the Federal Communications Commission (FCC) has "encouraged" media companies to present concerns regarding the Comcast/Time Warner Cable transaction to the FCC under an exemption of the commission's ex parte rules.

As you know, under rule 1.1204(a) (9), parties concerned about publicly participating in a Commission matter due to fear of possible reprisal or retribution can be exempted from the Commission's ex parte rules. I recognize and understand that the commission may need to grant such an exemption to a party under this scenario so that the FCC can obtain all the relevant factors before moving to adopt a public order.

However, the bar for such exemptions must be set high. Public orders issued by the FCC must be able to stand on its own merit. When orders that have significant impact on the industry are crafted based on information provided in secret and go unchallenged, I believe it can undermine the effectiveness of that order.

That is why I am respectfully asking you to provide whether any exempt ex parte presentations have been granted for either the Comcast/Time Warner Cable or the AT&T/DirectTV transaction, and if so, how many? In your response, please provide the specific justification for each instance.

Lastly, please address the role the FCC played in this action. If the FCC acted in such a manner that directly influenced granting an exemption, please provide the justification for an independent government agency committed to transparency and public comment to solicit such secret presentations.

Thank you for your attention to this matter and I appreciate your response.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dean Heller", with a stylized flourish at the end.

DEAN HELLER
U.S. Senator



OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

September 17, 2014

The Honorable Dean Heller
United States Senate
Washington, D.C. 20510

Dear Senator Heller:

Thank you for your recent letter regarding the Commission's narrowly constructed *ex parte* rule that exempts from required disclosure a "presentation [that] is made pursuant to an express or implied promise of confidentiality to protect an individual from the possibility of reprisal." I appreciate your interest in this matter and welcome the opportunity to clarify the application of this rule – 47 CFR Sec. 1.1204(a)(9) – in Commission proceedings.

To begin, I fully endorse the core principles you describe: "Public orders issued by the FCC must be able to stand on its own merit. When orders that have significant impact on the industry are crafted based on information provided in secret and go unchallenged, I believe it can undermine the effectiveness of that order."

I agree completely. That is why the Commission, in accord with the Administrative Procedure Act and applicable precedent, uses only information that is placed on the record when it renders a decision on whether to allow a transaction to proceed, with or without conditions. That is why the Commission strongly encourages broad public participation in its processes; so that the public can help build a comprehensive record (which includes information appropriately covered by a protective order). Doing so ensures that Commission decisions are supported by record evidence of all available facts.

At the same time, and as you also recognize, the rule 1.1204(a)(9), which has been in effect since at least 1997, exists for a reason: To provide a limited opportunity for entities who seek confidentiality "due to fear of possible reprisal or retribution." Indeed, this rule is only one of the ways that the Commission may appropriately be presented with information that is not placed in the public record. For example, applicants often visit the Commission after a transaction has been announced but before the release of a public notice initiating the *ex parte* process, in order to provide Commission staff with an initial understanding of the proposed transaction. The case law discussed below explains another situation in which the Commission has found it useful to have access to information that was held elsewhere in government but not included in the record before the Commission.

The courts have recognized that the Commission has flexibility in determining how best to conduct its review and analyze proposed transactions. In *SBC Communications Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995), which concerned a challenge to the Commission's identification of documents to be placed in the record of a merger proceeding, the Court explained that "[t]he Commission is fully capable of determining which documents are relevant to its decision-making". 56 F.3d at 1496. This decision was again cited in *Consumer Federation of America v. FCC*, 348 F.3d 1009 (D.C. Circuit 2003), when the Commission reviewed a commercial document that it then decided not to place in the administrative record; a decision that was upheld by the D.C. Circuit, which rejected a petition for review challenging the Commission's decision.

As I have explained, this rule does not permit the Commission to rely on that information when it makes a decision on the merits. It could be used, however, to help the Commission formulate appropriate questions to applicants or other parties; questions (and subsequent responses) which could be placed on the record. Alternatively, it could be used as a means of encouraging persons or entities to put their information on the record.

In sum, the processes used by the Commission are designed to serve the public interest by encouraging participation in Commission processes, by investing with the Commission staff the ability to obtain information it needs to do its job, and by ensuring that Commission decisions rest solely on information that is part of the public record.

Thank you again for making me aware of your interest and for the opportunity to clarify the Commission's approach on this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tom Wheeler", with a stylized flourish at the end.

Tom Wheeler